The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 290
INTRODUCER:	Judiciary Committee and Senators Fasano and Baker
SUBJECT:	Offenses Against Unborn Children
DATE:	April 20, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.	Daniell	Maclure	JU	**Fav/CS**
3.			JA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill amends provisions of law relating to offenses against "an unborn quick child" or "a viable fetus." The bill eliminates these terms and replaces them with "an unborn child."

The bill defines the term "unborn child" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." The bill also specifically provides that the definition of "unborn child" does not apply to any other statute unless the definition is made applicable through a cross-reference.

Florida's law relating to the killing of an unborn quick child is amended to specifically eliminate any requirement that the perpetrator of the crime had knowledge that the victim was pregnant or intended to cause the death of, or bodily injury to, the unborn child.

This bill substantially amends the following sections of the Florida Statutes: 316.193, 435.03, 435.04, 782.071, 782.09, and 921.0022.

II. Present Situation:

History of Prenatal Criminal Law

Beginning in the 17th century, the common law rule was that only children who were born alive were afforded protections of the criminal law.[1] This became known as the "born alive rule." Due to the lack of medical technology in that time, it was difficult for doctors to know the health or condition of an unborn child; therefore, it was impossible to prove whether an assault on the mother was the proximate cause of the death of the fetus. The born alive rule became the standard in federal cases for imposing additional punishment on a perpetrator in crimes against an expectant mother. The born alive rule has been challenged many times; however, courts have upheld it stating that it is the job of the state legislatures to change the law.

Alternatively, some jurisdictions began adopting the rule that an unborn child is afforded protection of the criminal law at quickening, which was defined as "'the first recognizable movements of the fetus, appearing usually from the sixteenth to eighteenth week of pregnancy.'"[2] Quickening also became the evidentiary standard for determining whether a person violated an abortion statute because, at the time (early 20th century), it was the most certain way to determine whether a woman was pregnant or not.

Finally, many jurisdictions have determined that an unborn child is afforded protection under the law if the fetus is viable. This term has been defined as "'the physical maturation or physiological capability of the fetus to live outside the womb.'"[3] The Massachusetts Supreme Court became the first court to include viable unborn children in the statutory meaning of "person" for purposes of criminal laws.[4]

Due to the advancement in technology and challenges to the born alive rule, many state legislatures have enacted changes to their criminal laws to provide a criminal penalty for crimes against unborn children. Although many jurisdictions began enacting such laws, some people felt that no protection existed for an unborn victim of a federal crime.[5]

Federal Unborn Victims of Violence Act[6]

The Unborn Victims of Violence Act (UVVA or act), signed into law on April 1, 2004, establishes a separate offense for harming or killing an unborn child during the commission of specified crimes.[7] Under the act, any person who injures or kills a "child in utero" during the commission of certain specified crimes is guilty of an offense separate from one involving the pregnant woman. Punishment for the separate offense is the same as if the offense had been

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[1] Joseph L. Falvey, Jr., *Kill an Unborn Child – Go to Jail: The Unborn Victims of Violence Act of 2004 and Military Justice*, 53 NAVAL L. REV. 1, 1 (2006).
[2] *Id*. at 5 (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 567 (1987)).
[3] *Id*. at 6 (quoting Forsythe, *supra* note 2, at 569).
[4] *Id*.
[5] Jon O. Shimabukuro, *The Unborn Victims of Violence Act*, CRS Report for Congress (May 21, 2004), *available at* http://assets.opencrs.com/rpts/RS21550_20040521.pdf (last visited Apr. 2, 2010).
[6] The information in this section of the Present Situation of this bill analysis is from the CRS Report for Congress. *Id*.
[7] *See* 18 U.S.C. s. 1841 and 10 U.S.C. s. 919a.

committed against the pregnant woman. In addition, an offense does not require proof that the person engaging in the misconduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the child in utero. The term "child in utero" is defined by the act to mean "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

In an attempt to preserve a woman's right to have an abortion, there are three specific exclusions from the prohibitions of the act:

- Persons conducting consensual, legal abortions;
- Persons conducting any medical treatment of the pregnant woman or unborn child; and
- Any woman with respect to her unborn child.

As of 2004, 29 states had statutes criminalizing the killing of a fetus or "unborn child"; however, the states identify different gestational stages at which the killing of the embryo or fetus will result in criminal liability. In three states, the killing of a viable fetus will result in criminal liability. Seven states criminalize the killing of a "quick" fetus, and in 15 states the killing of an "unborn child" or the termination of a human pregnancy without the consent of the mother will result in criminal liability. Finally, four states prohibit the killing of an unborn child at a specified gestational stage in the pregnancy.

Florida Law

Section 782.071, F.S., which is Florida's vehicular homicide statute, holds a defendant equally accountable for the death of a viable fetus as for the death of the mother or any other person killed as a result of the defendant's actions. This law also specifically recognizes a civil cause of action for damages under the Wrongful Death Act.[8] The term "viable fetus," which is cited by other homicide statutes within the Florida Criminal Code, is defined to mean "a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures." The term "viable fetus" is commonly used in abortion case law. For example, in 1989 the Florida Supreme Court stated that "the potentiality of life in the fetus becomes compelling at the point in time when the fetus becomes viable."[9] Further, the court provided the following definition of viability:

> Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. Under current standards, this point generally occurs upon completion of the second trimester. [N]o medical evidence exists indicating that technological improvements will move viability forward beyond twenty-three to twenty-four weeks gestation within the foreseeable future due to the anatomic threshold of fetal development.[10]

[8] Section 768.19, F.S.
[9] *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)
[10] *Id*. at 1194 (internal citation omitted).

Florida has a statute specifically aimed at holding a defendant equally accountable for the death of an unborn quick child as he or she would have been if the mother or any other person died as a result of the defendant's actions.[11] The crimes included in this section of law span from capital murder to manslaughter. For purposes of defining "unborn quick child," this statute references the definition of "viable fetus" in s. 782.071, F.S. Under current law, the mother of the unborn quick child is excluded from the provisions for an unlawful killing of an unborn quick child by any injury to the mother that would be murder if it resulted in the mother's death. However, the same exemption is not provided for the mother in the event of an unlawful killing of an unborn quick child by injury to the mother which would be manslaughter if it resulted in the death of the mother.[12] It is unclear if the exemption was intentionally excluded in the subsection relating to manslaughter.

Section 316.193, F.S., provides that a defendant who kills an unborn quick child as a result of committing DUI manslaughter is equally as culpable as if he or she killed any other human being. Again, for purposes of defining "unborn quick child," the statute references the definition of "viable fetus" in s. 782.071, F.S.

Although Florida law uses the definition of "viable fetus" to define "unborn quick child," the specific term "unborn quick child" is not defined in statute similarly to how it has been defined by the courts. In *Stokes v. Liberty Mutual Insurance Co.*, the Florida Supreme Court used a medical dictionary definition of "quick" in its analysis of a wrongful death claim. This term was defined as follows: Pregnant with a child the movement of which is felt.[13] However, Justice Ervin offered a different definition of "quick child" in a concurring opinion in a case overturning a conviction for unlawful abortion. Specifically, Justice Ervin said that a woman is pregnant with a quick child "'when the embryo (has) advanced to that degree of maturity where the child had a separate and independent existence, and the woman has herself felt the child alive and quick within her.'"[14]

III. Effect of Proposed Changes:

This bill amends s. 782.071, F.S., relating to vehicular homicide, by replacing the term "viable fetus" with "unborn child," and specifying that that statute should not be construed to create or expand any civil cause of action for negligence based on statute or common law. The bill mirrors federal law by defining the term "unborn child" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." The bill specifically provides that the definition of "unborn child" does not apply to any other statute unless the statute is made applicable through a cross-reference to s. 782.071, F.S.

Section 782.09, F.S., relating to the killing of unborn quick child by injury to mother, is amended to replace the term "unborn quick child" with "unborn child." The bill provides that the definition of an unborn child is the same as it is in s. 782.071, F.S. (Florida's vehicular homicide statute). It also specifies that the offense does not require proof that the defendant knew or

[11] Section 782.09, F.S.
[12] Compare s. 782.09(1), F.S., with s. 782.09(2), F.S.
[13] *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968)
[14] *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971) (Ervin, J., specially concurring) (quoting *State v. Steadman*, 51 S.E.2d 91, 93 (1948)).

should have known that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the unborn child.

Florida's DUI manslaughter statute, s. 316.193, F.S., is amended to replace the term "unborn quick child" with "unborn child," and the bill provides that the definition of the term is the same as it is in s. 782.071, F.S.

Finally, the bill amends ss. 435.03 and 435.04, F.S., relating to employment screening standards, and s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, to change the term "unborn quick child" to "unborn child."

The bill provides an effective date of October 1, 2010.

Other Potential Implications:

Section 782.09(4), F.S., currently states that "this section does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to chapter 390."[15] While this provision serves to prevent prosecutions based upon actions prohibited in s. 782.09, F.S., the terms amended by this bill could be relied upon in cases that reach beyond the criminal law.[16]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:[17]

This bill eliminates the use of the terms "unborn quick child" and "viable fetus" within Florida's criminal laws, and replaces them with "unborn child." The bill provides that an "unborn child" is "a member of the species homo sapiens, at any stage of development, who is carried in the womb." This is the same definition used in the federal Unborn Victims of Violence Act (UVVA or act). Similarly, Illinois' and Minnesota's prenatal criminal laws mirror the UVVA. Courts in Illinois and Minnesota have addressed the constitutionality of their state's prenatal criminal laws and have declined to invalidate

[15] Chapter 390, F.S., relates to the termination of pregnancy.
[16] *See* Office of the State Courts Adm'r, *Judicial Impact Statement HB 141* (Nov. 10, 2009) (on file with the Senate Committee on Judiciary). House Bill 141 is identical to this bill.
[17] Unless otherwise indicated, the information for this portion of this bill analysis is from the CRS Report for Congress. See Shimabukuro, *supra* note 5.

them. Although it cannot be known how Florida courts would interpret and apply the changes made by this bill, an examination of the cases from Illinois and Minnesota may provide some guidance as to how a court in Florida may consider a similar case.

In *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), the Minnesota Supreme Court concluded that the state's unborn child homicide statutes did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and were not unconstitutionally vague. Merrill shot a woman who was pregnant with a 27- or 28-day-old embryo. With respect to his equal protection claim, Merrill argued that the statutes subjected him to prosecution for ending a pregnancy while allowing a pregnant woman to terminate a nonviable fetus or embryo without criminal consequences. Merrill contended that the statutes treated similarly situated persons differently.

The court rejected Merrill's equal protection claim on the grounds that the defendant and a pregnant woman are not similarly situated: "The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act." Unlike the assailant who has no right to kill a fetus, the pregnant woman has a right to decide to terminate her pregnancy. The actions of the woman's doctor are based on the woman's constitutionally protected rights under *Roe v. Wade*.[18]

Merrill advanced two arguments for finding the statutes to be unconstitutionally vague. First, he contended that the statutes failed to give fair warning of the prohibited conduct. Merrill maintained that it was unfair to punish an assailant for the murder of an unborn child when neither he nor the pregnant woman may be aware of the pregnancy. However, the court found that the statutes provided fair warning based on the doctrine of transferred intent. The court noted that even if the offender did not intend to kill a particular victim, he should have fair warning that he would be held criminally accountable given that the same type of harm would result if another victim was killed.

Merrill's second argument was that the statutes encouraged arbitrary and discriminatory enforcement by using the phrase "cause the death of an unborn child"[19] to identify prohibited conduct without actually defining when death may occur. Merrill believed that the failure to identify when death occurs for the unborn child would result in judges and juries providing their own definitions. Moreover, Merrill asserted that because an embryo is not alive, it could not experience death.

The court determined that to have life means "to have the property of all living things to grow, to become." The court avoided the question of whether the unborn child should be considered a person or human being. Instead, the court observed that criminal liability "requires only that the embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties

[18] *Roe v. Wade*, 410 U.S. 113 (1973).
[19] Minnesota defines "unborn child" as "the unborn offspring of a human being conceived, but not yet born." See M.S.A. s. 609.266.

of life." Thus, the trier of fact would simply have to determine whether an assailant's acts caused the embryo or unborn child to stop growing or stop showing the properties of life.

In *People v. Ford*, 581 N.E.2d 1189 (Ill. App. Ct. 1991), the Fourth District Appellate Court of Illinois concluded similarly that the state's fetal homicide statute did not violate the Equal Protection Clause of the Fourteenth Amendment and was not unconstitutionally vague. Like in *Merrill*, Ford argued that the statute treated similarly situated people differently. While a pregnant woman could terminate her nonviable fetus without punishment, an assailant would face criminal penalties for killing such a fetus. Following the Minnesota Supreme Court, the Illinois court found that the defendant and a pregnant woman are not similarly situated. In addition, the court determined that the statute could be upheld as rationally related to a legitimate governmental purpose. Because the statute did not affect a fundamental right held by the defendant, and because it did not discriminate against a suspect class, the validity of the statute could be considered under the rational basis standard of review. The court concluded that the statute was rationally related to a legitimate governmental interest in protecting the potentiality of human life.

Ford's vagueness argument focused on the statute's use of the phrase "cause the death of an unborn child."[20] Ford contended that the absence of statutory definitions for when life begins and death occurs would result in the application of subjective definitions by the trier of fact, and lead to the arbitrary and discriminatory enforcement of the statute. Citing *Merrill*, the court maintained that the trier of fact would be required only to determine whether there was an embryo or fetus that was growing into a human being, and whether because of the acts of an assailant, that growing was stopped. The statute did not require the trier of fact to apply its subjective views.

Finally, Ohio's prenatal criminal legislation was challenged on Eighth Amendment grounds in *Coleman v. DeWitt*, 282 F.3d 908 (6th Cir. 2002). The Eighth Amendment not only protects individuals from cruel and unusual punishment, but also from sentences that are disproportionate to the committed crime. The United States Supreme Court set out a three-prong test for determining whether a sentence is disproportionate.[21] The first prong requires an examination of the gravity of the offense and the harshness of the penalty given. The second prong compares the defendant's sentence to the sentences of other criminals in the same jurisdiction convicted of the same offense. The final prong requires the court to examine how the same crime is treated in other jurisdictions.[22]

The court in *Coleman*, found that the defendant's sentence was not grossly disproportionate to the crime committed and therefore did not violate the Eighth Amendment. Specifically, the court held:

> Coleman's sentence of nine years for involuntary manslaughter is far from the "gross disproportionality" required to offend the Eighth Amendment. Coleman's actions were violent and deprived Williams of her child, or at

[20] Illinois defines "unborn child" as "any individual of the human species from fertilization until birth." See 720 IlCS 5/9-1.2.
[21] *See Solem v. Helm*, 463 U.S. 277 (1983).
[22] Falvey, Jr., *supra* note 1, at 24.

> least the ability to exercise her rights over her pregnancy. At least as important as a woman's right to terminate her pregnancy is her right to choose to carry her child to term. In a jurisprudence that finds mandatory life sentences for the non-violent possession of cocaine constitutionally permissible, we would be hard-pressed to find nine years for Coleman's violent act beyond the constitutional pale. Indeed, the Supreme Court has never held unconstitutional a sentence less severe than life imprisonment without the possibility of parole.[23]

One legal scholar has also done a more extensive analysis on whether a constitutional challenge against the UVVA would survive or not. This scholar found that prosecutions under the UVVA do not appear to constitute cruel and unusual punishment in violation of the Eighth Amendment.[24]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (conference), which provides the final, official estimate of the prison bed impact of criminal legislation, met on February 23, 2010, to consider this bill. According to the conference, this bill will have an indeterminate prison bed impact.[25]

The bill removes the definition of "unborn quick child," which was defined as a viable fetus capable of meaningful life outside the womb, and replaces the term with "unborn child," which is defined to mean a fetus at any stage of development in the womb. By expanding the definition to include a fetus at *any* stage of development, the bill may result in more prosecutions against a person for injury to, or death of, an unborn child. According to the Office of the State Courts Administrator, this bill may increase the number of felony cases, and hence the workload, coming into the judicial system. However, the number of cases should not be significant.[26]

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[23] *Coleman*, 282 F.3d at 915 (internal citations omitted).
[24] *See* Falvey, Jr., *supra* note 1, at 17, 24-27.
[25] Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Mar. 17, 2010), *available at* http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm (follow the "2010 Conference Results" link) (last visited Apr. 2, 2010).
[26] Office of the State Courts Adm'r, *supra* note 16.

VI. Technical Deficiencies:

On lines 96-101 of the bill, the language may be read to mean that a person who had no knowledge of a victim's pending pregnancy and no intent to murder the unborn child could be charged and convicted of the *specific intent to kill* act of capital murder (s. 782.04(1)(a)1., F.S.).

It is unclear if this is the intent of the bill. If this is not the intent, the Legislature may wish to amend the bill to read: "*Unless otherwise required by the elements of the crime,* an offense under this section does not require that a person engaging in the conduct: . . . ."

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on April 19, 2010:
The committee substitute adds language to the definition of "unborn child" to make clear that the definition does not apply to any other statute unless the definition is specifically made applicable through a cross-reference.

B. Amendments:

None.